



**Raurau v Njoroge & 5 others (Environment and Land Appeal  
22 of 2020) [2023] KEELC 796 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 796 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL 22 OF 2020  
CG MBOGO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**CECILIA NJOKI RAURAU ..... APPELLANT**

**AND**

**JACINTA MWANGOI NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

**CAROLINE MURAGURI ..... 2<sup>ND</sup> RESPONDENT**

**LEDAMA KARIA ..... 3<sup>RD</sup> RESPONDENT**

**BONIFACE KOIGI KURIA ..... 4<sup>TH</sup> RESPONDENT**

**LOICE SINTOYA KESUNA ..... 5<sup>TH</sup> RESPONDENT**

**JANE MUTHONI MOTIAN ..... 6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The appellant herein being aggrieved by the ruling of Hon G Wakahiu, chief magistrate, Narok delivered on July 21, 2020 in Narok ELC Case No 55 of 2018 on the application dated November 12, 2019 appeals to this honourable court on the said ruling on the following grounds: -
  - i. The learned trial magistrate erred in fact and in law in relying on matters that were not in issue in delivering a ruling dismissing with costs and the appellant's application dated November 12, 2019.
  - ii. That the learned trial magistrate erred in law and in fact in completely failing to address his mind to the affidavit evidence adduced by the appellant and her witnesses in arriving at the ruling delivered the appellant's application dated November 12, 2019.



- iii. The learned trial magistrate erred in law and in fact in delivering a ruling that did not address and or evaluate the evidence, the law and submissions presented by the appellant herein in support of the application dated November 12, 2019.
  - iv. The learned trial magistrate erred in law and in fact in delivering a ruling that was biased against the appellant herein.
  - v. The learned trial magistrate erred in law and in fact in failing to evaluate the evidence adduced by the appellant against the respondents' response that was weak and full of contradictions and inconsistencies.
  - vi. The learned trial magistrate erred in law and in fact in failing to consider the report by the executive officer of the court which did confirm that the respondents' herein jointly and severally were in contempt of court.
  - vii. The learned trial magistrate erred in law and in fact in dismissing the appellant's application without giving due regard to the applicable law on contempt of court proceedings.
  - viii. The learned trial magistrate erred in law and in fact in failing a finding on issues that were not in issue and or pleaded by the respondent before him.
  - ix. The learned trial magistrate erred in law and in fact in failing to address his mind to the submissions by counsels for the appellant in writing his ruling.
  - x. That the trial magistrate erred in fact and in law in imposing costs that were irrational, excessive and therefore punitive.
  - xi. That the trial magistrate erred in fact and in law in unilaterally assessing and imposing conditions on payment of costs without an application by the respondents herein.
  - xii. That the trial magistrate erred in fact and in law in setting standards of proof that was not supported by any law in arriving at his ruling.
2. The appellant prays that the ruling be set aside and in its place ruling entered allowing the appellants' appeal with costs.
  3. The appellant filed a record of appeal dated August 22, 2022. On November 16, 2022, this court directed the parties to file written submissions. None of the parties filed written submissions.
  4. As first appellate court, I shall re-evaluate the evidence and come to own conclusions, except, giving allowance of the fact that it neither saw nor heard the witnesses as matters of demeanor are best observed by the trial court.
  5. The appellant filed a notice of motion application dated November 12, 2019 under certificate of urgency seeking the following orders: -
    1. That service of this application be dispensed with instance.
    2. That the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants/respondents be arrested and committed to jail for a term not exceeding 6 months or for such a period of time that the court may deem fit and just for contempt of court.
    3. That in the alternative, this honourable court be pleased to order that the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants/respondents property be attached forthwith and



sold by public auction for disobeying the orders of this honourable court issued on the November 10, 2017.

4. That the plaintiffs/respondents do bear the costs of this application.
6. The respondents herein filed a replying affidavit in opposition to the application which was sworn on January 7, 2020.
7. The trial court delivered its ruling on July 21, 2020 and dismissed the application with costs. In the said ruling, the trial court arrived at the conclusion that there was no evidence of service of the order allegedly disobeyed, the photographs showing the activities were not produced in court and that the contempt application seems to have been dropped midway and the same was not fully prosecuted.
8. It is against this backdrop, that the appellant filed the instant appeal. In a bid to arrive at a fair conclusion, it is necessary for this court to re-evaluate the circumstances that lead to the filing of the contempt proceedings in the trial court.
9. A perusal of the notice of motion application dated November 12, 2019 that is the subject of this decision is that the respondents failed to comply with the directions of my brother Kullow, J issued on March 28, 2018. The said orders were as a result of a notice of motion application dated March 26, 2018 filed under a certificate of urgency. The court issued interim orders of injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants restraining them from dealing in any other manner with properties known as Cis-Mara/Eor-Enkitok/90 and Cis-Mara/Eor-Enkitok/91 and further directed that the application be served upon the respondents for hearing on April 18, 2018.
10. For record purposes, prayer 3 of the notice of motion application dated November 12, 2019 refers to the orders issued on November 10, 2017. The grounds in the application and the averments in the supporting affidavit refer to the orders issued on March 28, 2018. The trial court record does not bear any orders issued on November 10, 2017.
11. Going back to the ruling, the subject of appeal, the trial court dismissed the application for lack of service of the orders and failure to call the process server, if any, as a witness in the contempt proceedings. Before delivering the ruling, the trial court directed that the application be heard by way of viva-voce evidence. The court noted that despite the appellant indicating that they would be calling the process server, that did not take place and which the trial court was left to wonder whether indeed the service of the orders were effected on the respondents. The record of appeal filed by the appellant indicate that the respondents were served with the orders vide an affidavit of service sworn on April 11, 2018 by Erastus Kirui. A perusal of the lower court record, does not contain any affidavit of service. The trial court, in its view, read mischief in the filing of the contempt application. In this case, the appellant failed to call the process server for cross examination on whether there was service, if any, upon the respondents of the orders of the court issued on March 28, 2018 but failed to do so.
12. Section 5 of the *Judicature Act* provides as follows:-'The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.'
13. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in *Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR* which court restated the applicable law on contempt of court as that which was applicable before the enactment of the 2016 Act, and rendered that the applicable law, the English law on committal for contempt of court



under rule 81.4 of the [England Civil Procedure Rules](#), which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the [Judicature Act](#).

14. For a party to succeed in an application for contempt of a court order or decree, at least four elements must be satisfied;
  - a) That the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the defendant.
  - b) That the defendant has knowledge of or proper notice of the terms of the order.
  - c) The defendant has acted in breach of the order.
  - d) The defendant's conduct is deliberate.
15. Contempt proceedings are quasi – criminal in nature as the liberty of a person is at stake. The standard is therefore higher than in civil proceedings on a balance of probabilities but not beyond reasonable doubt as is required under criminal proceedings. This principle was reiterated in the case of [Gatharia K Mutikika versus Babarini Farm Ltd \(1985\) KLR 227](#) and cited in the case [Katsuri Ltd versus Kapurchand Depar Shali \[2016\] eKLR](#) whereof it was stated
  - ' 1. The courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved it must be higher than proof. On a balance of probabilities, almost, but not exactly, beyond reasonable doubt.'
16. The said court proceeded to add, thus,
  - ' 1. The guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge'
17. The test for when disobedience of a civil order constitutes contempt has been stated in the case [Samuel MN Mweru & Others versus National Land Commission & 2 Others \(2020\) eKLR](#), as follows:-
  - ' 1. As whether the breach was committed 'deliberately and malafide; A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good father avoids the infraction.'
18. The question now is whether the appellant satisfied the four elements to merit consideration of the contempt application. On the first issue, which is whether the orders were clear and unambiguous and binding on the respondents, a reading of the said orders issued on March 28, 2018 are straightforward which among other orders is an interim order of injunction pending hearing and determination of the application.
19. On the second issue which is whether the respondents had knowledge of the orders or proper notice of the said orders. As it can be seen from the record, the respondents filed an undated replying affidavit sworn by the 1<sup>st</sup> respondent in court on April 18, 2018. This in my view, shows that indeed the 1<sup>st</sup> respondent had knowledge of existence of the said orders. However, owing to the non- existence of a valid affidavit of service on the court record, it cannot be easily discerned whether all the respondents had knowledge of the said orders.



20. In the case of *Stewart Robertson vs Her Majesty's Advocate, 2007 HCAC63*, Lord Justice Clerk stated that: 'contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings'.
21. While I place reliance on the above cited authority and taking into consideration the observation of the court in arriving at its decision, I am in agreement with the trial court that the appellant despite being granted an opportunity to call the process server for cross examination, failed to do so. Therefore, this court cannot say that the respondents had the knowledge of the court order and therefore disobeyed the same. I do also note that the application the subject of this appeal was left hanging, the appellant did not see it to its conclusion. Once the appellant obtained interim orders of injunction, she left it at that. I am left to wonder whether the appellant was indeed keen on prosecuting the same.
22. Having pronounced myself on the above two elements, I find the third and fourth elements in the negative.
23. Arising from the above, I find that the amended memorandum of appeal dated March 14, 2022 lacks merit and the same is dismissed. I make no orders as to costs. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON. MBOGO C.G.**

**JUDGE**

**16/2/2023.**

**In the presence of:**

CA:Chuma

